IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.646 of 2007

Shri Sakerwala Zuzar Mohsinbhai. .. .. Petitioner

Versus

1. The Principal Secretary
   (Appeals and Security),
   Government of Maharashtra,
   Home Department & Detaining Authority
   Mantralaya, Mumbai.

2. The State of Maharashtra

3. The Inspector of Police,
   PCB, CID, Mumbai.

4. The Secretary to the Govt. of India
   Ministry of Finance, Dept. of Revenue,
   New Delhi.

5. The Superintendent of Prison,
   Nasik Road Central Prison,
   Nasik. ... ... Respondents

Mr.Rizwan G. Merchant with Mr.S.Wagh for Petitioner.

Mr.D.S. Mhaispurkar, Additional Public Prosecutor for State.

CORAM : DR.S. RADHAKRISHNAN &

SMT.ROSHAN DALVI, JJ.

Date of reserving the judgment : 8th October, 2007

Date of pronouncing the judgment : 26th October, 2007

JUDGMENT : (Per Smt.Roshan Dalvi, J.)

1. The Petitioner has applied for issuance of the writ of Habeas Corpus challenging his detention order No.PSA-1106/CR-11/SPL-3(A), dated 21st August 2006 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) and for declaration that it be quashed and set aside.

2. The Petitioner came to be arrested upon the charge of smuggling goods being Titan wrist watches and computer memory cards on 3.1.2006 when he was intercepted at the Arrival Baggage Hall at Sahar Airport. It is the case of the Petitioner that he went through the red channel. It is also his case that he never made the declaration that he was carrying any dutiable goods. It is the case of the Respondents, and it is a part of the statement of the Petitioner recorded under

Section 108 of the Customs Act and further statements recorded under the said section, that the Petitioner declared that he was carrying 200 watches and 300 computer memory cards. However, a check of his baggage revealed 750 watches, 3000 computer memory cards and 3125 computer multimedia cards. The said goods were seized. The entire value, which the Petitioner had not declared, as required, came to Rs.77,00,775/- (CIF). The detention order is passed under Section 3(1) of COFEPOSA for smuggling these goods into India without payment of custom duty upon the aforesaid incident.

3. The argument on behalf of the Petitioner is as amazing as it is amusing. It is argued on behalf of the Petitioner that the Petitioner did not have to declare the dutiable goods he carried or its value thereof. He had passed through the red channel. The fact of such passing itself is deemed to show that he carried dutiable items. It is, therefore, for the Customs Officer, in-charge at the relevant time to check his

baggage and to ascertain the value of dutiable goods.

4. There is nothing to show that the Petitioner passed through the red channel. Each owner of the baggage/passenger is required to fill in the declaration form under Section 77 of the Customs Act for declaring the dutiable goods carried by him. The declaration form requires the passenger to fill in, interalia, the value of the dutiable goods. The customs gate-pass, which is a part of the declaration form torn and given to the passenger to carry whilst passing through the channels shows, interalia, a column for "the total value of dutiable goods being imported". The contention of the Petitioner that the value need not be shown in the declaration form is, therefore, incorrect. The Petitioner' s customs gate-pass shows that the Petitioner wanted to pass through the Customs Authorities without declaring any goods. The terms and conditions on the reverse of the said form show the extent of goods which can be imported without payment of duty. Under Section 111(l) and (m) of

the Customs Act any misdeclaration of any value of duty of the dutiable goods payable brings the case within the definition of smuggling under Section 2(39) of the said Act. The said definition also applies to COFEPOSA. For such smuggling activity, an order of detention under Section 3(1) is liable to be passed, if such activity is seen to be prone to repetition.

5. We may mention that the statements of the Petitioner recorded from time to time that the Petitioner used to visit Dubai and Singapore often, shows that he was in the business of exporting and importing goods. The passport of the Petitioner, which is shown in the compilation, bears out this fact by numerous entries of leaving India and returning to India. There is nothing to show that the Petitioner had paid any custom duty at any time in the past as a law abiding citizen.

6. The case of the Detaining Authority that the Petitioner had smuggled the goods under Section 3(1) of the COFEPOSA Act

and that his activity was susceptible to repetition, cannot be successfully challenged.

7. It is contended on behalf of the Petitioner that the vital document being his letter dated 13.3.2006 submitted to the Sponsoring Authority has not been placed before the Detaining Authority, and consequently, not considered. Hence, the detention order is liable to be vitiated. The Petitioner came to be detained on and from 4.1.2006. His first statement under Section 108 of the Customs Act came to be recorded on 4.1.2006. He made retraction statement on the same day thereafter. His further statements came to be recorded on 12.1.2006 and 25.1.2006. Thereafter the Petitioner sent the letter dated 13.3.2006. After the said letter also, his further statement has been recorded on 7.6.2006. In that statement he has stated that the facts contained in the letter dated 13.3.2006 are not true.

8. We may mention that in the letter dated 13.3.2006 the crux of the Petitioner' scase is that he had purchased the

items which were imported by him from various persons/dealers in Singapore and that the Petitioner had obtained commercial invoice from some of the dealers from whom he purchased the goods. He had enclosed a copy of one such commercial invoice in respect of some of the goods. He further contended that all the commercial invoices were taken away from him at the time of seizure and hence, no documents were available with him but that he could get some commercial invoices. From out of such invoices, he was enclosing one such invoice. In the further statement dated 7.6.2006, the Petitioner retracted even the said statement made in his own letter sent to the Sponsoring Authority. He stated that the goods belonged to one Iqbal and on instructions of Iqbal, he cleared the goods and he was to hand over the goods to the persons as per his instructions on the mobile. It is, therefore, clear that the entire case made out by the Petitioner in his written letter to the Sponsoring Authority along with a copy of the commercial

invoice was retracted by him once again and substituted by the further statement dated 7.6.2006 that the facts stated in his letter were not correct and that one Iqbal was to blame.

9. The Sponsoring Authority has, therefore, in his discretion and wisdom not put up the said letter before the Detaining Authority. We may mention that if such a letter had, in fact, been put up before the Detaining Authority, the Detaining Authority could have been misguided and the Petitioner would have been well within his rights to challenge the detention order on the ground of mis-application of mind with regard to that aspect, he having retracted his own written letter and the documents annexed thereto. A document disclaimed by the Petitioner himself in his own further statement cannot be taken to be a vital document on which a decision could be based. The Detaining Authority has considered the Petitioner' s case in the light of the Petitioner's statement more specially the last statement which has not been retracted. The order, therefore, does not

get vitiated by non-application of mind.

10. The Petitioner was not available for service of the detention order for several months. He has been stated to be absconding. The order under Section 7(1)(b) of the COFEPOSA Act has been passed. It is for the Petitioner to explain his whereabouts from the date of the detention order until his arrest pursuant to the proclamation issued under Section 7(1)(b) of the COFEPOSA Act.

11. Paragraphs 5 and 6 of the Petition explain the position that prevailed on and from 17.1.2007 when the proclamation came to be issued. There are no averments in the Petition to show the whereabouts of the Petitioner for the entire period between 21.8.2006 and 17.1.2007. The fact that the Petitioner was absconding is, therefore, confirmed.

12. Paragraph 6 of the Petition shows that pursuant to the order/Notification dated 17.1.2007 calling upon the Petitioner to present himself at the office of the Commissioner of Police, Brihan Mumbai, the Petitioner on

26.2.2007 claims to have visited the said office. The Petitioner has also not shown where he was between 17.1.2007 and 26.2.2007.

13. The Petitioner has questioned the non-action of Respondent No.1 in not taking him in custody when he visited the office of the Commissioner of Police on 26.2.2007. The Petitioner has nothing to show that he attended that office. The Petitioner has not produced any written directions refusing to take him in custody or calling upon him to appear elsewhere in the said application or even in this Petition before this Court. Mr.Merchant on behalf of the Petitioner has contended that the Petitioner's statement in paragraph 6 of the Petition has not been controverted or denied by the Respondents and Respondent No.1 has not produced the visiters' book showing the attendance of the Petitioner at the office of the Commissioner of Police. The Petitioner has not called upon Respondent No.1 to produce the said document, a certified copy of which could have been

produced upon notice. The fact of the Petitioner having visited the office of the Commissioner of Police on 26.2.2007 as per the mandate contained in the order dated 17.1.2007 is, therefore, not substantiated.

14. The Petitioner has taken out an application on 26.2.2007 before the learned Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai, with a prayer to cancel his bail bond and to take him in custody. The Petitioner was required to surrender not before the Court but before the Commissioner of Police. The Court was required to hear the application for cancellation of his bail, which he moved. It may be mentioned that the Petitioner came to be arrested in the case of smuggling certain goods on 4.1.2006 . He was thereafter released on bail. He desired his bail bond to be cancelled. He had until then not surrendered before the Commissioner of Police. At best, he went to his office to attempt to surrender. The application made by the Petitioner is titled “an application for surrender and

cancellation of bail bond" and marked Annexure "E" to the Petition. The application mentions about pasting of the order dated 17.1.2007 and further mentions about the directions contained therein. It also mentions that the Petitioner carried out those directions. However, he was not in custody but was directed to appear before the concerned department at the Airport or before the Court.

15. He applied for being taken in custody by cancelling his bail bond ostensibly upon the directions passed by the office of the Commissioner of Police (which was not produced). The Petitioner also applied for notice to be issued to the complainant.

16. Reading of the application shows no ground other than the order dated 17.1.2007 for the Court to take him in custody and cancel his bail bond. Such a procedure is unknown to law. He was required to have insisted upon the office of the Commissioner of Police to take him in custody pursuant to the express directions contained in the order

dated 17.1.2007. The Petitioner did not do so. The Petitioner only alleged oral directions that came to be passed in the office of the Commissioner of Police. The Magistrate issued notice as per the request of the Petitioner at the end of his application. The notice was made returnable on 2.3.2007, four days after its issue.

17. On 2.3.2007, the complainant, who is the Sponsoring Authority, being the Customs Department, filed its reply to the application. It resisted the application for cancellation of the bail bond on the ground of there being no provision in law, by which the Court could cancel the bail bond of the applicant on the ground that the detention order was pending against him. It was contended that the application was misconceived and hence, it was the Customs Authorities who applied for the application to be rejected.

18. It is argued by Mr.Mhaispurkar on behalf of the State that the Petitioner had made himself scarce from August 2006 to January 2007. A proclamation came to be issued in respect

of the Petitioner. The Petitioner had to explain his whereabouts. Even after the issue of the proclamation, the Petitioner did not explain his whereabouts from 17.1.2007 to 26.2.2007. The Petitioner did not even follow the directions in the proclamation order. The attempt of the Petitioner was ulterior and malafide. The Petitioner was released on bail. He was not found while on bail. It would have been the entitlement of the Department to have his bail bond cancelled. It was not for the Petitioner to have it cancelled. The detention order that was passed on 21.8.2006 was on a footing that the Petitioner was released on bail. If the Petitioner would again be taken in custody, the Detaining Authority would have had to reconsider the detention order. If that was not reconsidered, it was liable to be vitiated. It was to that end that the Petitioner made a misconceived application before the Magistrate instead of insisting upon the office of Commissioner of Police to accept his surrender.

19. The learned Magistrate considered these aspects and

passed an order rejecting the said application on 2.3.2007 itself. That order has not been challenged. On the same day, the detention order dated 21.8.2006 came to be served upon the Petitioner.

20. The Petitioner has alleged that there has been a delay in the service of the detention order from 26.2.2007 to 2.3.2007 - a period of 3 clear days, the 4th day being 2.3.2007. The contention in the Petition is that of a delay of 5 days. Interestingly, the Petitioner has not challenged the delay between 21.8.2006 and 17.1.2007 or between 17.1.2007 and 26.2.2007 since that is for the Petitioner himself to explain.

21. The delay of the aforesaid 3 clear days is, therefore, required to be seen to consider whether the detention order has been vitiated.

22. The Merchant relied upon a judgment in the case of ***A. Mohammed Farook vs. Jt. Secty. to G.O.I. & ors.*** **2000 Supreme Court Cases (Cri) 411**. That was a case of delay of 40 days in execution of the detention order. That was not

a case of issue of the proclamation. In that case, the detenu was present in the Court of the Additional Chief Metropolitan Magistrate on the date of the detention order as well as a month thereafter. It was held that the Respondents were not diligent to serve the detention order and did not show steps taken in that behalf. This case is quite the reverse.

23. Other judgment in the case of ***Manju Ramesh Nahar vs. Union of India & ors.*** **1999 Supreme Court Cases (Cri) 498** relied upon by Mr.Merchant is even more distinguishable. It is in respect of delay of more one year from 3.2.1997 to 23.4.1998 without showing any explanation in

executing the order.

24. Further, Mr.Merchant relied upon a judgment in the case of ***K.P.M. Basheer vs. State of Karnataka & anr.*** **1992 Criminal Law Journal 1927** where also the Petitioner appeared before the Collector of Customs 2 days after the detention order was passed and yet was not served the

detention order. That was also not a case of the issue of proclamation after a length of time when the Petitioner was found absconding.

25. In the case of ***Dinesh Kumar Jain vs. Union of India & anr.*** **1999 Criminal Law Journal 1481**, the delayed service of the detention order was only vaguely explained. It was stated that the Petitioner evaded the execution of the order and was not available at his home. He made an application for surrendering before the concerned Magistrate. The change of circumstances were brought to the notice of the Detaining Authority a week after which the detention order came to be served. In that case, although the detenu was stated to be absconding, no attempts were shown to be made for the detenu' sapprehension. The detention order, which was passed on 20th May 1998, was served on 11th August 1998. It was held that the delay vitiated it.

26. Each of the above judgments do not apply to the facts of this case in which the Petitioner has been found absconding

and in the absence of the Petitioner discharging the onus that lay upon him to show that he was not absconding. The Petitioner has been served on the very day the Magistrate refused to accept his surrender by cancelling his bail bond.

27. It has been contended on behalf of the Respondents that the Detaining Authority was given information that the Petitioner was to appear before the Court of the learned Additional Metropolitan Magistrate on 2.3.2007 so that the efforts were made to serve the detention order upon the Petitioner on that day itself. This reply is borne out by the record and by the Petitioner' s own chronology given for showing how he made the application in an incorrect forum. It has been further contended on behalf of the Respondents that the Petitioner could not have been arrested between 26.2.2007, when he took out the aforesaid application and got the notice issued by the registry, and 2.3.2007 since the application before the Court was pending in deference to the Court proceedings.

28. Mr.Mhaispurkar has relied upon an unreported judgment of the Division Bench of this Court in the case of ***Bapu Shantaram Satam vs. The Union of India & ors.*** **in Writ Petition No.1909 of 2003, dated 29th June 2004** in which a similar Petitioner claimed to fall within the umbrella of delay when he was himself absconding. It has been observed in that judgment that when there is no categorical statement that the detenu was available for service and an evasive statement is made which shows an unhappy conduct of the detenu, the delay cannot be held in his favour. It has been further observed that slackness, inertia or indolence could be attributed to the authorities if a person is available for service and yet the order is not served promptly. If the person makes himself scarce or if the members of his family hoodwink the authorities by making false statements, the authorities cannot be held responsible for the delay. It is, therefore, concluded that the Court cannot allow the detenu to reap benefit of his own objectionable conduct. In the

present case, the Petitioner was not available for months on end. Inquiry from his father revealed that he was in Madhya Pradesh but that his whereabouts were not known. The Petitioner could not be served and the proclamation had to be issued. Even after the issue of the proclamation, which admittedly was pasted on the door of his residence on 17.1.2007, the Petitioner did not surrender promptly. If the Petitioner was available at his residence, as has been his case, and was never absconding, the Petitioner should have surrendered immediately after 17.1.2007. The Petitioner has chosen to surrender after more than a month and before the wrong forum. The Petitioner' sact is not only incorrect but the explanation given by Mr. Mhaispurkar on behalf of the Respondents shows that it is a motivated act. It is quite another matter that the Petitioner did not succeed in his motive.

29. As a last-ditch effort, Mr.Merchant has contended that pages 11, 14 to 16, 27 to 29, 33 and 69 to 71 of the

documents supplied in the compilation to the Petitioner are illegible and prevented the Petitioner from making an effective representation which would vitiate the detention order. We have gone through the documents. We cannot say that they are clear or easily legible. However, they are not so illegible as to disable the Petitioner from deciphering their contents. Nothing prevented the Petitioner from demanding further copies of those documents from the Detaining Authority. The detention order cannot get vitiated merely on that count. We may mention that in fact the compilation of the judgments submitted by the Petitioner itself does not comply with the yardstick of clear legibility.

30. Consequently, the Petition lacks bonafides and has no merit. It is dismissed. Rule stands discharged.

(DR.S. RADHAKRISHNAN, J.)

(SMT.ROSHAN DALVI, J.)